

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-190**

SHANNON BANTA

APPELLANT

**VS. FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

**** ** ***

The Board at its regular March 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 11, 2013, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this _____ day of March, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stafford Easterling
Shannon Banta
Stephanie Appel

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APPELLEE

This matter came on for an evidentiary hearing at 9:30 a.m., ET, on December 11, 2012, at 28 Fountain Place, Frankfort, Kentucky, before Kim Hunt Price, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Shannon L. Banta, was present at the evidentiary hearing and was not represented by legal counsel. Appellee Justice and Public Safety Cabinet, Department of Corrections (DOC), was present and represented by the Hon. Stafford Easterling.

BACKGROUND

1. Appellant, **Shannon L. Banta**, was employed as a Correctional Officer at the Luther Luckett Correctional Complex and resigned from her position on July 26, 2012, effective July 27, 2012 (Joint Exhibit 1).

2. Appellant testified that on July 22, 2012, she received a letter from Inmate Hembree toward the end of her shift. She took it home with her because there has been a previous incident in her dorm and the Unit Administrator, Jim Wright, said that all reports should be made directly to him versus others within the chain of command after that point. She was off work on July 23, 2012, but came into the office that day to speak with the Unit Administrator. Wright came up front and they went to the Internal Affairs (IA) Investigator's office. The Investigator was in the Captain's office, so they went there and gave the letter to her. The Unit Administrator told the IA Investigator that Appellant was following his direct command to report to him first. Appellant then filled out an occurrence report.

3. Appellant was off work on July 24, 2012, and then worked on July 25, 2012. On July 26, 2012, she was posted on the front desk and received a call that Officer Mayes would be relieving her and she was to go to the IA office.

4. When Appellant reached the IA office, Captain Lindsay Dowden told her that she had interviewed Inmate Hembree, and there was evidence that he knew things about Appellant's personal life which would make it in her best interest to resign in order that she could keep her comp time, sick time and be able to withdraw her retirement. Appellant was upset and asked to speak with Warden Greg Howard. She testified that they went into the Warden's office.

5. Phillip Bramblett, Deputy Warden, was not initially in the Warden's office, and Dowden left for a period of time. During that time, Appellant alleged that the Warden said they were gone to get additional evidence against her, and he asked her if she had any physical contact with Inmate Hembree. She told him they had bumped knuckles and the Warden asked her where the Inmate lived. She said he had told her, but she really couldn't remember. At that point, Appellant alleges that the Warden slammed his hand down upon the desk and said she was lying. Appellant asked him if there were any options other than resignation, and he raised the issue of PREA, the Prison Rape Elimination Act, with her.

6. The Warden said that if PREA had been violated, he would find her wherever she was at, and have her arrested. At that time, Bramblett and Dowden came into the office with folders and more evidence. Appellant stated she wanted to resign and Dowden walked her to the Personnel Office, where they printed out a blank form which she signed and Dowden walked her to the front door as she left.

7. Appellant denied there was any relationship between her and Inmate Hembree. On cross-examination, she acknowledged that she was the Program Officer for Hembree's cell. The inmate had talked with her about his sister raising his daughter while he was in jail. Hembree had also said to her that she looked like she was having a bad day, and she said that she was. The inmate knew that her husband was a musician. The inmate did all the cleaning in the dorms and she had to give him chemicals out of the closet, so she had daily contact with him, but not a personal relationship, although they sporadically had personal conversations for two or three months.

8. Appellant acknowledged that it was not appropriate for a corrections officer to have personal conversations with inmates.

9. On July 22, 2012, Appellant was working in Unit 7-E, and had pizza for lunch. Control Officers would pass the garbage down out of the Control Tower, which sits higher than the lower levels, in order that the Control Officers can view the upper and lower levels. There was pizza left in the box, and all the garbage and pizza was passed down. Inmate Hembree was

the janitor and, after he took the garbage, he came back, threw a roll of toilet paper up, and it had the note inside of it.

10. Inmate Hembree's letter was introduced as Appellee's Exhibit 1 and stated,

What's up? I figured I'd might as well be the one who breaks the ice. I really like you and I care about you too. I've cared about you for a long time now. I enjoy talking to you and just spending that little bit of time with you takes me away from here for that little bit of time. I don't want nothing from you, but you! I'm lonely in here and I don't have nobody in here or out there. I know I can make you happy and if given a chance a hole (sic) lot more 9 months from now. I want a new life and a fresh start. I'm sure you're ready for the same. Would you take a chance with me, please. If you are serious I can still stop my transfer. I'll be thinking about you.

11. Appellant acknowledged that it was not appropriate for an inmate to send an officer a letter and it was important for her to turn this over to her supervisors or the Unit Administrator because the inmate was trying to start a relationship with her, and she did not want that. She was aware that she could be terminated for such a relationship, because it would put the facility at risk.

12. Appellee's Exhibit 2, a disciplinary violation against Inmate Hembree was introduced, showing that he did go to the key window, was fed pizza by Officer Banta and did not do anything to start a relationship with her until she told him about her family and how hard she was having it in the outside world. The inmate further stated that he had been fed by her multiple times, and had talked with her about her family. He also stated that he was told to look her up on Facebook when he got out, and that is why he sent her the letter. The inmate did receive disciplinary action in this matter due to being found guilty of trying to pursue a relationship with an officer. He received thirty (30) days in segregation, thirty (30) days of good time lost with the good time lost being suspended for 180 days.

13. According to Appellant, her meeting with Dowden was about five (5) minutes long. On cross-examination, Appellant stated when she was speaking with the Warden, his office was about 10 to 20 feet away from Dowden's office, and when Dowden went to see if Appellant could speak to the Warden, she could not hear what was said. She felt that she and the Warden were in his office alone for 5 or 6 minutes. She was crying and pleading with him for any alternative other than resignation.

14. The Warden had told her he could not suspend her due to the circumstances. He did not say whether she could be transferred to another institution, but did say it would be public record concerning her relationship with the inmate.

15. Appellant testified that she felt like she had no other choice but to resign. She took her badge and ID card off and handed them to someone and Dowden took her to the Personnel Office.

16. Appellant admitted she had previously given the inmate a candy bar.

17. Appellant stated that neither Bramblett nor Dowden did anything which was intimidating; it was the Warden threatening her with PREA, his demeanor, his slamming his fist down on the desk and saying she was lying which was intimidating.

18. Appellant felt she had done what she was supposed to by turning the letter in, and that they had taken the inmate's word over hers.

19. **Lindsay Dowden**, the IA Captain, testified that when Appellant was called to the office, she told Appellant she had reviewed a video from July 22, 2012, which showed the inmate coming from the upper level, getting the pizza box, taking it back up the steps into his cell and then bringing the box out and putting it into the trash. The video also showed him with the toilet paper and sending it up to Appellant. Dowden explained to Appellant that this was a violation of CPP 3.1, the Code of Ethics, to give food to an inmate. Dowden told Appellant she could resign and the matter would not go to the Personnel Board.

20. Dowden testified that the Warden was not aware of the situation until Appellant asked to speak to him. Dowden walked across the hall from her office to his, briefed him her findings, and he agreed to meet.

21. Dowden verified that the inmate never stated there was any sexual contact which would have violated PREA. His statement was consistent with Appellant's that their hands may have touched by a "fist bump." If there is staff misconduct, Dowden verified that PREA is always looked into. She did address this further with the inmate after Appellant resigned, to be certain if any further action needed to be taken under PREA. No such action was necessary in this matter.

22. Dowden verified the investigation began as an investigation against the inmate because of the letter. However, when she viewed the video, she thought it showed more than the inmate giving Banta a note, because Appellant had intentionally dropped a pizza box to give to an inmate, which was unusual. She did acknowledge the charge officers often put trash down to send to the janitor, but according to Dowden, Hembree was not a janitor.

23. Dowden verified that when she spoke to the inmate, he said if he was in trouble, the Appellant was going to be in trouble too. Her interview with the inmate indicated that he and Appellant had talked on a personal level for a month, and he was aware she was not happy at home and there were problems with her taking care of her husband's children. The inmate felt that her giving him the pizza was a green light for him to move ahead in the relationship. Appellant had also given the inmate cookies, pens and other items in the past.

24. Dowden testified that both she and Appellant went into the Warden's office and stayed for a few minutes before Bramblett came in. She felt that Appellant was in the room while she told the Warden what had happened. The Warden had called Bramblett to come over and he came very quickly. The Warden asked Appellant if there had been any sexual contact while Dowden was in the room and she said no. She did say she had inappropriate conversations and had released personal information to the inmate. The Warden told Appellant that if there was a PREA issue, he would contact the State Police. However, he did not slam his fist down or say that he would hunt her down wherever she was at to have her arrested.

25. Dowden stated Appellant then stepped out of the office and the Warden and Bramblett were discussing the matter when Appellant knocked on the door, came back in and said she resigned, and handed her badge and ID to Dowden. Dowden then escorted Appellant to the Personnel Office to obtain the paperwork for the resignation.

26. Dowden testified the only time Appellant would have been alone with the Warden was when she went to her office across the hall to get paperwork, which may have been for 10 seconds. She felt that if there had been any banging of a fist, she would have heard that. However, she thought Appellant had stepped out of the Warden's office during this period of time that Dowden had stepped across the hallway, but she cannot positively say Appellant did not go back into the Warden's office during that time.

27. Dowden stated she never yelled at Appellant or physically intimidated her, and she never saw or heard the Warden do so.

28. Dowden did not believe that Inmate Hembree was the janitor after watching the video, because the janitors take the trash to the front and not up the stairs to their dorms. Further, the inmate had reported to her that Appellant had told him over the intercom she had some pizza and asked him if he wanted to come down and get that, and the video appears to back up that story.

29. At the close of Appellant's proof, a motion was made for directed verdict.

FINDINGS OF FACT

1. The Appellant revealed personal information to an inmate concerning problems she was having at home and the fact she was on Facebook.

2. By her admission, Appellant had previously given candy and other items to the inmate, which makes it believable and credible to the Hearing Officer that the pizza in this matter was given to the inmate.

3. Inmate Hembree did send a letter to Appellant seeking a personal relationship and was disciplined for same.

4. If Appellant was ever alone in the office of the Warden, it was for a period of no more than 5 or 10 seconds, with another person being 10 to 20 feet across the hallway, therefore the Hearing Officer finds that the Warden did not slam his fist on his desk or yell at Appellant.

5. PREA was discussed during the time that Dowden was in the Warden's office with Appellant.

6. The case of Russell Caudill vs. Tourism, Arts and Heritage Cabinet, Department of Parks, 2009 WL 315933 (KY PB), January 12, 2009, states, "A constructive discharge claim is one in which a reasonable person would find conditions of employment so intolerable that the person would feel compelled to resign." These conditions must be shown by objective criteria. Brooks vs. Lexington-Fayette County Urban Housing Authority, 132 SW 3d 790, 807 (Ky. 2004).

7. Ann Allen vs. Cabinet for Health and Family Services, 2005 WL 6154372 (KY PB), August 9, 2005, provides that constructive discharge must be analyzed using both the objective feelings of an employee and the intent of an employer. With regard to the intent of an employer, the Appellant must show that an employer intended and could reasonably have foreseen the impact of their conduct on the employee.

8. Finally, Redmon vs. McDaniel, 540 SW 2d 870 (Ky. 1976), provided "It is not duress to threaten to do what one had a legal right to do, nor is it duress to threaten to take any measure authorized by law in the circumstances of the case, and a mere threat to exercise a legal right made in good faith is neither duress nor coercion in law. A threat may be said to be made in good faith if made in the honest belief that valid grounds exist to justify the action threatened."

CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for good cause. KRS 18A.095(1). Appellant was a classified employee with status at the time she resigned from employment.

2. Appellant bore the burden of proof by a preponderance of the evidence that she had been constructively discharged in this matter. Preponderance of the evidence means “evidence which, as a whole, shows that the fact sought to be proved is more probable than not. With respect to burden of proof in civil actions, it means a greater weight of evidence, or evidence which is more credible and convincing to the mind.” Black’s Law Dictionary, 5 Ed., Page 1064.

3. Further KRS 13B.090, Subsection 7 sets the burden of persuasion in administrative hearings as that of a preponderance of the evidence and failure to meet that burden of proof are grounds for a dismissal of the action.

4. The Appellee had a complete right, and in fact, an obligation to investigate the matter of a personal relationship between an employee and an inmate, including an investigation into PREA violations. Therefore, the Warden having stated there would be a PREA investigation is within both the right and the obligation of the Appellee. There is no credible proof that the Warden’s actions were in any way physically intimidating to the Appellant.

5. Based upon the Internal Affairs investigation into this matter, the Warden was within his right to request a further investigation and to request termination of Appellant. Thus, it cannot be considered to be duress for him to have made these statements to Appellant.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SHANNON L. BANTA V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2011-074)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on

which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Kim Hunt Price** this _____ day of February, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Stafford Easterling
Ms. Shannon L. Banta